LOW HIONG BOON (f) v. PUBLIC PROSECUTOR

[A. Cr. J. (Spenser Wilkinson J.) March 17, 1949]

[K. L. — Criminal Appeal No. 12 of 1949]

Penal Code, s. 304A — Plea of guilty — Criminal negligence — Whether Magistrate should accept plea of guilty — Professional negligence.

In this case the appellant was charged in that she did cause the death of one Liew Kam Fook aged 10 months old by a negligent act not amounting to culpable homicide to wit, by allowing the ignorant mother of the deceased to administer an overdose of oleum chinnapodium when she was a nurse on duty and thereby committed an offence under s. 304A of the Penal Code. She pleaded guilty and her plea was accepted and she was convicted.

Held: in view of the difficulties of the law relating to criminal negligence and of the facts in this case, which were not simple, the learned District Judge should not have accepted the plea of guilty.

Cases referred to:—

(1) *Rex v. Bateman* 19 Cr. App. R. 8.

(2) *Andrew v. Director of Public Prosecutions* (1937) A.C. 576.

(3) *Cheow Keok v. Public Prosecutor* (1939) F.M.S.L.R. 90; (1940) M.L.J. 103.

(4) *Public Prosecutor v. Mohamed Salleh* (1940) F.M.S.L.R. 36; (1940) M.L.J. 187.

(5) *Lee Ah Chai v. Rex* (1947) M.L.J. 195.

(6) *Rex v. Crick* 1 F. & F. 520.

(7) *Collins v. Hertfordshire County Council* (1947) K.B. 598.

MAGISTRATE'S CRIMINAL APPEAL.

R. P. S. Rajasooria for the appellant.

A. M. I. Austin (D. P. P.) for the respondent.

Spenser Wilkinson J. : — The appellant in this case was a Chinese Probationer Nurse in her third year of probation employed in the General Hospital, Kuala Lumpur. She was charged before the District Judge (as he then was) as follows:—

That you on 8.9.48 at about 4 a.m. caused the death of Liew Kam Fook, male, aged 10 months old by a negligent act not amounting to culpable homicide to wit, by allowing the ignorant mother of the deceased to administer an overdose of Oleum Chinnapodium when you were a nurse on duty at Ward No. 2 of General Hospital, Kuala Lumpur, on that day and thereby committed an offence under s. 304A of the Penal Code.

When charged with this charge on the 3rd of February, 1949 the appellant claimed trial and the case was postponed for hearing to the 25th February. Upon the matter coming up for trial on the 25th February the appellant was presumably re-charged; at all events, she then pleaded guilty. There is nothing on the record to show whether or not the learned District Judge interrogated the appellant as to what exactly she thought she was admitting but this plea of guilty was then recorded. The prosecuting officer proceeded to outline the facts of the case as follows:—

Accused gave bottle to the ignorant mother of child Liew Kam Fook with instructions to give child a dose at 4 a.m. Dose 3 drops. Mother gave half bottle of oil of Chinnapodium and a little later gave the other half. Child became violently ill and died. Post Mortem revealed cause of death due to overdose. Accused gave birth to a child 1 month later.

The appellant then made a few remarks in mitigation and the case adjourned "for evidence on investigation as to accused's medical condition and sentence". The same afternoon two medical officers who had been in the General Hospital at the time of the alleged offence gave evidence which was directed mainly to the appellant's physical condition when the incident took place. At the conclusion of the evidence of these two medical officers the learned trial Judge recorded that the appellant did not wish him to call any other witnesses but asked for leniency. He then recorded a conviction. On conviction the appellant was sentenced to five months simple imprisonment.

The appellant appealed both against conviction and sentence. At the hearing before me the Deputy Public Prosecutor pointed out that as she had pleaded guilty the appeal could only be against the sentence and he cited section 305 of the Criminal Procedure Code. This provision, however, does not, in my view, preclude an Appellate Court from considering the question whether the plea of guilty was one which could properly be accepted in the circumstances; and for the reasons which I will now proceed to set out, I was of the opinion that this was not a case in which the plea guilty should have been accepted. I, therefore, had no alternative but to quash the conviction and sentence to order that the appellant be re-tried before another President of a Sessions Court.

The law relating to negligence is by no means free from difficulties and the question whether a particular act or omission amounts to criminal negligence or merely to civil negligence has been frequently canvassed in the Courts both here and in England. Except, therefore, in a case where the facts are simple and the law applicable to those facts beyond doubt it seems to me to be impossible to expect an accused person unversed in the law and unrepresented by counsel to be able to say, yes or no, whether he has been guilty of criminal negligence. In this particular case, where the appellant was a young Chinese girl and the circumstances in which the alleged negligence took place were obscure, it was, in my opinion, wrong for the learned District Judge to accept the plea of guilty.

The law as to criminal negligence has been laid down in England in a long series of cases culminating in the decision in the leading case of *Rex v. Bateman*[1] the principles of which decision were applied by the House of Lords in 1937 in *Andrew v. Director of Public Prosecutions*[2]. It has been held on two occasions by the Court of Appeal in the Federated Malay States that the principles set out in *Rex v. Bateman*[1] apply to offences under section 304A of our Penal Code and to any other sections of the Penal Code which make negligent acts a criminal offence. See *Cheow Keok v. Public Prosecutor*[3]; *Public Prosecutor v. Mohamed Salleh*[4]. Even though I may share the doubts regarding these decisions expressed by Murray-Aynsley C.J. in *Lee Ah Chai v. Rex*[5] I feel bound to follow them and so long as these decisions stand there can be no doubt as to what the general principles of the law are. In the course of the judgment in *Rex v. Bateman*[1] there is set out a list of some seventeen decisions dealing with alleged negligence by persons professing special knowledge and skill and amongst them there are several cases which deal with alleged negligence through administering poison or dangerous drugs. Perhaps the closest in its facts to such facts as we know in the present case is *Rex v. Crick*[6] where a herbalist allowed the mother of a child to administer *lobelia* from which the child subsequently died. It is interesting to observe that in this as in the other poisoning cases referred to in *Bateman's*[1] *case* the prisoner was found not guilty.

There have been many cases in which the question of negligence by doctors, nurses and others has been discussed in regard to the question of civil liability. The case of *Collins v. Hertfordshire County Council*[7] appears to me to be an authority for the proposition that the position of a nurse is not the same as that of a consulting physician or surgeon. A patient who consults a physician or surgeon relies upon his skill as such. When a patient is admitted to hospital he or she, whilst assuming that reasonably competent nurses are supplied, does not go to that hospital relying on the skill of any particular nurse. It seems, therefore, that the duty owed by a nurse in a hospital is not so high as the duty owed by a medical practitioner to his patients, and according to *Halsbury's* Laws of England (*Hailsham* Ed. Vol. 22 p. 358 paragraph 358) a nurse is liable for negligence in the performance of her duties like any other person. Therefore, as the whole basis of negligence is the duty owed, even the case of *Rex v. Bateman*[1] does not, perhaps, entirely apply to the case of a nurse in a hospital.

I have said enough, I think, regarding the law relating to cases of this kind to show how difficult it may be to assess whether the negligence alleged in a case such as this does or does not amount to criminal negligence. In the particular case before me it seems to me that before anything approaching a just assessment can be made of the degree of culpability of the appellant it would be necessary to have some information, if it is available, upon, at least, the following matters :—

(a) the nature of the alleged poison with details as to how it is usually administered and how much would normally amount to a fatal dose;

(b) the source from which the medicine in this case came — e.g. whether from a locked cupboard or from the dispensary or elsewhere — and evidence tracing it from this source through the hands of the appellant until the moment when it was administered to the child who died;

(c) the usual procedure in the hospital in question in regard to this particular drug — e.g. who prescribes the dose, who mixes them and how they are usually administered. This would enable one to know whether there was anything unusual in the procedure in this case;

(d) the precise instructions, if any, given by the appellant to the mother who actually administered the medicine; and

(e) details of the number of other patients in the ward with some indication as to what they were suffering from so as to be able to form some idea as to how much attention they need. With this, of course, goes the question of how many nurses were on duty in the particular ward and what supervision there was over such nurses.

When evidence of the nature of that above outlined has been given then it will, no doubt, become possible to form some view as to whether the appellant in this case was guilty (in the words of *Rex v. Bateman*[1]) of negligence or incompetence which went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment; or whether the facts show merely those matters necessary to establish civil liability; or whether the appellant has been guilty of no negligence at all. In view of the course I have taken in regard to this appeal I express no view as to which of these results is the most likely. That will be a matter for the President of the Sessions Court which re-tries the case to consider in the light of the law to which I have directed attention.

It is perhaps unnecessary to add that in the circumstances of this case it is desirable that the re-trial of the appellant should take place at the earliest possible opportunity.

Re-trial ordered.